



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1973

No. 72-1371

DONALD C. ALEXANDER,  
Commissioner of Internal Revenue, *Petitioner*  
v.  
"AMERICANS UNITED" INC., *et al.*, *Respondent*

On Writ of Certiorari to the United States Court of Appeals  
for the District of Columbia Circuit

**STATEMENT OF AND BRIEF FOR  
COUNCIL ON FOUNDATIONS, INC.,  
NATIONAL ASSOCIATION FOR MENTAL  
HEALTH, INC.,  
AMERICAN COUNCIL ON EDUCATION  
AMERICAN JEWISH COMMITTEE  
AS AMICI CURIAE**

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The attached brief is filed by consent of the petitioner and the respondent, on behalf of the Council on Foundations, Inc., the National Association for Mental Health, Inc., the American Council on Education, and the American Jewish Committee, as *amici curiae*.

*Amicus curiae* Council on Foundations, Inc. is a national nonprofit membership corporation organized

to assist foundations in accomplishing their philanthropic objectives. The Council has more than 600 member foundations, which hold more than one-half of all foundation assets in the United States. The Council and its member foundations have all been ruled by the Internal Revenue Service to be exempt from federal income tax pursuant to sections 501(a) and 501(c)(3) of the Internal Revenue Code of 1954.<sup>1</sup> The vast majority of grants made by the Council's member foundations are to organizations ruled exempt from federal income tax pursuant to these same Code sections.

*Amicus curiae* National Association for Mental Health, Inc. is a national nonprofit membership corporation organized for the exclusive purpose of fostering better understanding and treatment of mental illness within the United States. The Association has more than one million members and is comprised of more than 800 affiliated mental health organizations which carry on programs of community education and social action. The Association and all of its affiliates have been ruled by the Revenue Service to be exempt from federal income tax pursuant to sections 501(a) and 501(c)(3). They are dependent upon charitable contributions to finance their operations.

*Amicus curiae* American Council on Education is a national nonprofit membership corporation organized as a center of cooperation and coordination for the improvement of education at all levels, with special emphasis on higher education. The membership of the American Council includes 69 percent of the public,

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<sup>1</sup> Unless otherwise stated, all statutory references are to the Internal Revenue Code of 1954, as amended, which is Title 26 of the United States Code.

and 80 percent of the private, nonprofit accredited institutions of higher education in the United States. Virtually all of the American Council's private member institutions of higher education and some of its public member institutions have been ruled exempt from federal income tax under section 501(a) as organizations described in section 501(c)(3). Virtually all of the public member institutions receive substantial financial support from section 501(c)(3) entities directly associated with them. The American Council's member institutions depend upon charitable contributions from individuals and corporations for a substantial portion of their overall financial support.

*Amicus curiae* American Jewish Committee is a national nonprofit membership corporation founded in 1906. Although the chief purpose of this organization is to prevent the violation of civil and religious rights of American Jews, it has from its very inception been devoted to the attainment of civil and religious liberty for all Americans. The Committee has been ruled exempt from federal income tax pursuant to sections 501(a) and 501(c)(3). It has approximately 40,000 members and is dependent upon charitable contributions from individuals and corporations for a substantial part of its operations.

*Amici curiae* are filing the attached brief because they believe in principle that Internal Revenue Service rulings relating to the qualification of charitable organizations under sections 501(c)(3) and 170(c)(2) should be subject to adequate judicial review. They believe the denial of review in this case would be tantamount to denying any adequate review and would constitute a serious threat to philanthropic or-

ganizations. *Amici* believe the need for adequate review is imperative where, as in this case, important questions regarding charities' First Amendment rights are presented. Accordingly, *amici* support the position of respondent, and contend that the decision of the Court of Appeals should be affirmed.

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**INTRODUCTION: THE STATUTORY SCHEME**

Tax laws are of critical importance to charities in this country. The Internal Revenue Code reflects a congressional design to employ special tax provisions to encourage socially beneficial actions through pri-

vate philanthropy.<sup>1</sup> As a practical matter, these special provisions determine both the scope and the nature of charitable activity. This case concerns the relationship of these special tax provisions and the so-called letter ruling program, whereby the Internal Revenue Service issues rulings stating its views on the tax consequences of proposed transactions.<sup>2</sup>

Section 501(a) of the Code<sup>3</sup> provides exemption from federal income tax for, *inter alia*, the organizations described in section 501(c)(3):

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . .

Section 170(a) provides for a deduction from federal income tax for contributions to the organizations described in section 170(c)(2). With certain minor exceptions, these are the same organizations described in section 501(c)(3).<sup>4</sup> Sections 2055(a)(2) and

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<sup>1</sup> See, e.g., Treasury Department Report on Private Foundations, submitted to the Committee on Finance, United States Senate, 89th Cong., 1st Sess. 12-13 (Comm. Print 1965).

<sup>2</sup> See generally Rev. Proc. 72-3, 1972-1 C.B. 698.

<sup>3</sup> All statutory references are to the Internal Revenue Code of 1954, as amended.

<sup>4</sup> The exceptions are foreign organizations and organizations engaged in "testing for public safety," which qualify as exempt under section 501(c)(3) but not for eligibility to receive deductible charitable contributions under section 170(c)(2).

2522(a)(2), also substantially the same as section 501(c)(3), provide for deductions under, respectively, the federal estate and gift tax laws.

The Service's letter ruling program is not specifically authorized in the Code. It is based on the general mandate of section 7805(a) to the Commissioner of Internal Revenue to "prescribe all needful rules and regulations" for the enforcement of the Code.<sup>5</sup>

The program has had a unique impact in the area of the tax law pertaining to charities. For many years the Revenue Service has made available a printed "Form 1023," which "is to be used to apply for a ruling and determination in recognition of an organization's exempt status under section 501(c)(3)."<sup>6</sup> And the Tax Reform Act of 1969 gave indirect approval to the rulings program in this area by adding section 508(a) to the Code, under which a new organization seeking to operate under section 501(c)(3) must give "notice to the Secretary or his delegate, in such manner as the Secretary or his delegate may by regulations prescribe, that it is applying for recognition of such status." Treasury Regulation section 1.508-1(a)(2)(i), interpreting this provision, states that section 508(a) notice is to be given by the filing of a "Form 1023, exemption application." Thus, under present law a new organization cannot qualify under section 501(c)(3) unless it has at least requested a letter ruling.

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<sup>5</sup> The program was initiated by the Service in 1940, for reasons of administrative necessity, and was formally announced in 1953 by Revenue Ruling 10, 1953-1 C.B. 488. See generally Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, N.Y.U. 20th Ann. Inst. on Fed. Tax. 1 (1962).

<sup>6</sup> Internal Revenue Service, Instructions for Form 1023, paragraph A (Revised Nov. 1972).

In addition, the rulings program is critical for appearance on what amounts to the official Revenue Service list of charitable organizations, Publication No. 78, *Cumulative List of Organizations described in section 170(c) of the Internal Revenue Code of 1954*. Inclusion in the *Cumulative List* signifies that an organization "has received a ruling or determination letter . . . stating that contributions by donors to the organization are deductible as provided in section 170 of the Code."<sup>7</sup> Revenue Procedure 72-39, 1972-2 C.B. 818, superseding Revenue Procedure 68-17, 1968-1 C.B. 806. The Service holds that donors can rely upon the *Cumulative List* in making contributions, and that with certain exceptions gifts to a listed organization prior to announcement by the Service that contributions are no longer deductible will be treated as deductible under section 170, irrespective of the organization's actual status.<sup>8</sup> This "advance assurance of deductibility" to prospective donors represents a departure from the Service's general position that "a taxpayer may not rely on an advance ruling issued to another taxpayer." Revenue Ruling 72-3, 1972-1 C.B. 698, 705. The assurance does not apply to organizations which do not appear in the *Cumulative List*, even if they hold rulings from the Service recognizing their section 170(c)(2) eligibility. Revenue Procedure 72-39, *supra*.

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<sup>7</sup> The *Cumulative List* is kept current by the periodic publication of supplements and announcements reflecting new rulings, revocations, and terminations.

<sup>8</sup> The exceptions are "where the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for, or was aware of, the activities or deficiencies on the part of the organization that gave rise to the loss of qualification." Rev. Proc. 72-39, 1972-2 C.B. 818.

## ARGUMENT

### I. AS A PRACTICAL MATTER MANY CHARITABLE ORGANIZATIONS MUST HAVE A RULING IN ORDER TO RAISE FUNDS AND OPERATE

The court below noted the critical importance of the Service's letter ruling program for charitable organizations:

Because of the "tax breaks" attendant to contributions to corporations qualifying under § 170(c) of the Code, qualification thereunder is a precious possession and removal from the Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of 1954 is a damaging—sometimes fatal—injury to the financial status of any "charitable" organization. Potential contributors with a minimum of business acumen are careful to get the most for their contributed dollar, and one certain way not to do so is to contribute to non-§ 170 corporations. 477 F.2d at 1177.

This statement goes to the heart of the practical problem encountered by many organizations of the types specified in sections 501(c)(3) and 170(c)(2). A great many such organizations have little gross income and no net or taxable income, and are therefore basically unaffected by the section 501(c)(3) exemption from tax. But they must depend upon contributions to finance their operations, and it is of extreme importance to them that they qualify under section 170(c)(2) as eligible to receive deductible contributions.<sup>9</sup>

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<sup>9</sup> Rulings on section 170(c)(2) eligibility are commonly issued in response to Form 1023 requests for rulings on exempt status under section 501(c)(3). Eligibility to receive deductions under the federal gift and estate tax laws is also normally covered in such rulings. See Department of the Treasury, Internal Revenue Manual, Part XI, Chapter (11) 671, *Exempt Organizations Handbook* §§ 130(2)(b); 130(2)(d); Exhibit 200-10.

Individuals and corporations not exempt from federal income tax generally wish to minimize the cost of their charitable donations, and to do this they must qualify each donation as a deductible "charitable contribution" under section 170(c)(2). If a donation does not so qualify, it will not support a deduction from gross income and the full amount of the donation will have to be made by the donor in after-tax dollars. Therefore, prospective donors who are subject to tax customarily request assurance, when solicited for donations, that the donee falls within the provisions of section 170(c)(2).<sup>10</sup>

In the case of prospective donor organizations which are themselves exempt from federal income tax, assurance is generally sought that the requested donation will at least qualify as being for a purpose specified in section 170(c)(2)(B)—that is, "religious, charitable, scientific, literary, or educational purposes or . . . the prevention of cruelty to children or animals." Organizations exempt under section 501(c)(3) desire this assurance because a donation for purposes other than those specified in section 170(c)(2)(B) might raise a question whether the donor organization was operating "exclusively," as section 501(c)(3) requires, for the purposes specified in that section. In the case of private foundations,<sup>11</sup> which are an important source of support for many charities, assurance is strictly required by reason of the provisions of section 4945,

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<sup>10</sup> For the same reason, charitable solicitation material addressed to small donors generally includes a representation by the soliciting organization that it is eligible to receive deductible contributions.

<sup>11</sup> The term "private foundation" is defined in section 509(a). Essentially, it includes all organizations within section 501(c)(3) other than specified classes of public charities, such as churches, schools, and hospitals.

which imposes heavy penalty taxes on such organizations for "taxable expenditures," a term which includes any amount paid or incurred "for any purpose other than one specified in section 170(e)(2)(B)." Normally, qualification for exempt status under section 501(c)(3) will imply the needed qualification under section 170(e)(2)(B).<sup>12</sup>

As a practical matter, the only way to provide prospective donors with the type of assurance they require is for the soliciting organization to show that it is included in the *Cumulative List* or to produce a letter ruling from the Service recognizing its eligibility to receive deductible charitable contributions under section 170 (e)(2). Prospective donors of all types generally insist upon such Service-sanctioned evidence of charitable status,<sup>13</sup> and the Internal Revenue Service has recognized this. As Randolph W. Thrower, speaking as Commissioner of Internal Revenue, noted:

Even before the Tax Reform Act [of 1969], a ruling from the Internal Revenue Service was,

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<sup>12</sup> An examination by *amicus* Council on Foundations, Inc. of recently published foundation annual reports extracted in Volume 1 of The Foundation's Center's 1972-73 *Information Quarterly* revealed that all of the 70 foundations discussing standards for approving grant applications required prospective organizational grantees to establish exempt status under section 501(c)(3).

<sup>13</sup> See, e.g., Parker, *Relations with the Internal Revenue Service: Exemption Application, Rulings, and Audits*, N.Y.U. Proceedings of the 9th Bien. Conf. on Charitable Foundations 223-24 (1969) :

Probably the most immediate benefits of obtaining such a ruling are exemption from taxes on the organization's income and a listing in the Treasury Department's *Cumulative List of Organizations Contributions to Which are Deductible*. Listing in this publication . . . is most important for charities. Without it, it is virtually impossible to obtain contributions.

Such evidence is also customarily regarded as a prerequisite for the representations to small donors referred to in n. 10, *supra*.

generally speaking, the sine qua non for solicitation of charitable contributions and foundation support. . . . [W]e know that our denial of exemption, or even our refusal to rule on the organization's qualifications, may doom the organization.<sup>14</sup>

Obviously the revocation of a letter ruling, as occurred in this case, strikes a heavy blow at an organization seeking to pursue the purposes specified in sections 501(c)(3) and 170(e)(2). Revocation means that the organization can no longer provide prospective donors with the assurance which is generally necessary for the obtaining of funds. In many cases, particularly where the organization has not achieved widespread recognition, the inability to provide such assurance will mean a sharp drop in the organization's funds, a curtailment of the organization's activities, and even a termination of the organization's existence.<sup>15</sup>

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<sup>14</sup> Remarks by Randolph W. Thrower, Commissioner of Internal Revenue, Southwest Legal Foundation, Dallas, Texas, January 15, 1971, p. 3. [Hereinafter cited as "Thrower Remarks"] These remarks have been reproduced, in abridged form, in 34 *Journal of Taxation* 168 (March 1971), under the title *IRS is considering far reaching changes in ruling on exempt organizations*. Citations throughout this brief are to the original remarks, which were publicly distributed. See also Rogovin, *Tax Exemptions: Current Thinking Within the Service*, N.Y.U. 22nd Ann. Inst. On Fed. Tax. 945, 952 (1964).

<sup>15</sup> As the Court of Appeals for the Fourth Circuit noted in *Bob Jones University v. Connally*, 472 F.2d 903, 906, *rehearing denied*, 476 F.2d 259 (1973), *petition for cert. pending* (No. 72-1470): "We have no doubt that Jones University will suffer irreparable injury if withdrawal of its tax-exempt status is effected even if it should ultimately prevail in its argument that its tax-exempt status may not legally be disturbed. . . . [W]e would be naive indeed not to recognize the substantial portion that contributions play in the gross income of any institution of higher learning and the adverse effect on those contributions if their deductibility for income and estate tax purposes of the donors is disallowed."

Thus, the court below was amply justified in focusing upon the practical importance to respondent of the decision by the Revenue Service to revoke its letter ruling. Such a ruling is functionally equivalent to a license to carry on operations, and its revocation bears very serious consequences.

## **II. THERE ARE NO REAL ALTERNATIVES TO A SUIT FOR INJUNCTIVE RELIEF AS A MEANS TO REVIEW A RULING REVOCATION**

The Commissioner does not dispute respondent's vital interest in the ruling which the Revenue Service has revoked. But he contends there is no reason for the courts to consider an injunction to restore that ruling. In his view, respondent has alternative means to bring its case before a court: a suit by a "friendly donor" for a refund of income taxes (based on a claimed "charitable contribution" to respondent), or a suit by respondent itself for a refund of unemployment taxes.

These alternatives are not designed to present a court with the issues involved in a ruling revocation, and they are ill suited to that purpose. Neither the suit by a "friendly donor" nor the suit for refund of unemployment taxes permits review of the revocation itself, and neither provides a real opportunity for an aggrieved organization to regain its letter ruling and inclusion in the *Cumulative List*—its "license" to operate.

Even in theory, the issues presented in the supposed alternatives are not those which the organization wishes resolved. The suggested suit by a "friendly donor" does not permit the organization to assert *its* rights and interests. In the present case, for example, respondent advances a variety of First Amendment contentions based on its rights to freedom of speech and

to petition the Congress for a redress of grievances. It is not at all clear that a friendly donor would be in a position to raise similar arguments in support of a claimed charitable contribution to respondent.

On the other hand, the suit for a refund of unemployment taxes does not focus on the critical issue of eligibility under section 170(c)(2) to receive deductible charitable contributions.<sup>16</sup> Although it is possible that such a suit could succeed in establishing exempt status under section 501(c)(3), it is questionable whether a victory of this nature would be equivalent to a letter ruling in the eyes of prospective donors.

Moreover, both of the suggested alternatives entail, in practice, a real problem of delay. In the time required for a final adjudication of either type of suit, many organizations having lost their ruling would be gravely and perhaps permanently crippled. Commissioner Thrower made this point very clearly:

There is no practical possibility of quick judicial appeal at the present. . . . Assuming the readiness of the organization or donor to litigate, the issue under the best of circumstances could hardly come before a court until at least a year after the tax year in which the issue arises. Ordinarily, it would take much longer for the case of the organization's status to be tried. As for testing by the donor, even if all administrative appeals are waived, the organization must wait until it or its donor files a tax return, the Service processes the return, the return is selected and examined, and a deficiency is proposed. Probably, the case would be developed more quickly if the taxpayer re-

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<sup>16</sup> The same may be said of a suit for refund of social security taxes which, in the circumstances of this case, the Commissioner does not claim to be an adequate alternative remedy. (Brief for Petitioner, p. 19, n.12.)

frained from taking the deduction on his return but promptly filed a claim for refund. While all of this time is passing, the organization is dormant for lack of contributions and those otherwise interested in its program lose their interest and move on to other organizations blessed with the Internal Revenue imprimatur; and the right to judicial review is not pursued.<sup>17</sup>

Finally, most importantly, neither of the suits suggested by the Commissioner as alternative remedies can produce the practical consequences which attend upon a ruling from the Revenue Service. The Service's own views concerning decisions in such suits reveal their limited efficacy. Paragraph 270 of the *Exempt Organizations Handbook*, the Service's official internal manual in this area of the tax law, states:

An organization which obtains a tax court or district court decision holding it to be exempt must file an exemption application and establish its right to exemption before the Service will recognize its exemption for years subsequent to those involved in the court decision.<sup>18</sup>

This means that a favorable judicial decision does not of its own force lead to either the issuance of a ruling by the Service or to inclusion in the *Cumulative List*. As noted previously, these constitute the means of assurance on which many prospective donors rely in determining where their philanthropy will be directed.

Paragraph 270 of the Handbook focuses on the essential difference between a ruling from the Service

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<sup>17</sup> Thrower Remarks, p. 3.

<sup>18</sup> Department of the Treasury, Internal Revenue Manual, Part XI, Chapter (11) 671, *Exempt Organizations Handbook* ¶ 270.

and a victory in court by either of the alternative routes which the Commissioner proposes: the ruling is a prospective statement, ensuring exemption and eligibility to receive deductible contributions as long as a certain general mode of operations is employed; the court decision is retrospective, focusing on specific facts that occurred during a particular period in the past and no others. In other words, the alternative judicial remedies suggested by the Commissioner are not truly alternative remedies. The essential relief sought by respondent—advance recognition of charitable status—cannot be granted by a court in the suggested proceedings, and the Service has not committed itself to provide such relief in the event of a court decision adjudicating exempt status.

### **III. THE ANTI-INJUNCTION ACT NEED NOT AND SHOULD NOT BE INTERPRETED TO BAR THE INJUNCTIVE REMEDY IN THIS CASE**

For the reasons set forth above, if the alternatives suggested by the Commissioner were the only remedies available to an organization whose ruling was revoked, many such revocations would escape judicial review altogether. It is apparently the Commissioner's position that the anti-injunction act, section 7421(a) of the Code, read in light of *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), requires this result. He maintains that injunctive relief is unavailable here even if the alternatives are completely inadequate.<sup>19</sup> It does not matter that an important interest of the

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<sup>19</sup> The Commissioner's position is that *Williams Packing* will permit injunctive relief only upon a threshold showing of "an abuse of the executive power so blatant as to render it certain that revenue officials cannot prevail on the merits of their claims." (Brief for Petitioner, p. 8.) Respondent does not purport to have made such a showing.

respondent has been harmed; that the administrative action causing the harm may have been erroneous or even unconstitutional; that the respondent is without practical remedy. All of these considerations are overridden, in the Commissioner's view, by section 7421(a) and "the Executive's need to assess and collect taxes as quickly and as efficiently as possible, with a minimum of delay and interference from the judicial branch." (Brief for Petitioner, pp. 14-15.)

The Commissioner's position is both unsupported and dangerous. It is not required by the anti-injunction act or *Williams Packing*. It essentially seeks an extension of the act's coverage to an area where it does not in terms or purpose apply, and where it would threaten other congressional policies expressed in the Internal Revenue Code.

**A. This Case Does Not Involve a Restraint on the Assessment or the Collection of Taxes**

Section 7421(a) precludes suits "for the purpose of restraining the assessment or collection of any tax." Plainly, the statute cannot reach every action which could limit the Government's prospects of ultimate success in tax disputes. To construe section 7421(a) so broadly would bar any litigation of tax issues—in refund cases, Tax Court proceedings, or otherwise; for collateral estoppel, *stare decisis*, or simply respect for precedent will frequently extend such a limiting effect to decisions in actions of those kinds also. Section 7421 (a) must be restricted to actions which seek to interfere with the procedural power of the Service "to assess and collect taxes alleged to be due . . ." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. at 7.

This is not such a suit. It is, rather, an action seeking to regain a ruling that has been revoked by the

Revenue Service, and thereby to restore respondent's practical ability to raise funds. Assessment and collection of the respondent's taxes remain legally available to the Service whether or not such a ruling is in effect,<sup>20</sup> and both could be sustained upon a showing that the respondent had not operated in accordance with the provisions of sections 501(c)(3) and 170(c)(2).<sup>21</sup>

It is true that if the Service assessed taxes against an organization in the face of a court-ordered ruling recognizing its status under sections 501(c)(3) and 170(c)(2), the agency might find it difficult to prevail on the merits in the absence of a showing that the law had changed since the court's decision or that the organization had ceased to act in accordance with the facts upon which the court's decision was founded. But this result would follow from the substance of the prior decision, not from the fact that the decision was obtained in an injunctive proceeding for review of a ruling revocation. Any type of judgment on the merits — including one rendered in a refund suit — has the

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<sup>20</sup> Both "assessment" and "collection" are statutory terms. The rules relating to "assessment" are set forth in subtitle F, Chapter 63 of the Internal Revenue Code, sections 6201 through 6216. "Collection," on the other hand, is described in subchapter F, Chapter 64, Code sections 6301 through 6344. Since the impact of a ruling is not statutorily described, the statute does not envision that a ruling will affect assessment or collection in any way.

<sup>21</sup> The Revenue Service retains the right to revoke rulings "at any time in the wise administration of the taxing statutes," and to apply revocations with retroactive effect "unless the Commissioner or his delegate exercises the discretionary authority under section 7805(b) of the Code to limit the retroactive effect of the revocation or modification." Rev. Proc. 72-3, 1972-1 C.B. 698, 705. The general statement of views on retroactivity appearing in section 13.05 of this Revenue Procedure is broad enough not to limit the Service's freedom.

same impact on the Government's chance of success in later controversies.<sup>22</sup> Hence, this cannot be the kind of restraint on assessment which section 7421(a) envisions.

Furthermore, relief of the type sought in the instant action would have at most only slight and tangential effects upon the revenue. With respect to the organization itself, the Service would not be precluded from collecting any valid taxes. In most circumstances, it would not even be prevented from collecting invalid taxes pending a refund action.<sup>23</sup>

So far as donors to the organization are concerned, to the extent the relief requested would include res-

<sup>22</sup> The courts that have been faced with the question whether injunctive relief against a ruling revocation or denial constitutes a restraint on assessment or collection have not subjected the issue to analysis, but have simply assumed that any decision contrary to the will of the Commissioner was within the reach of section 7421(a). See, e.g., *Crenshaw County Private School Foundation v. Connally*, 474 F.2d 1185 (C.A. 5, 1973), *Bob Jones University v. Connally*, 472 F.2d 903, *rehearing denied*, 476 F.2d 259 (C.A. 4, 1973), *petition for cert. pending* (No. 72-1470); cf. *Jolles Foundation v. Moysey*, 250 F.2d 166 (C.A. 2, 1957). But see *McGlotten v. Connally*, 338 F. Supp. 448 (D. D. C. 1972).

<sup>23</sup> It may be that a taxpayer faced with an attempted assessment in the face of a court-ordered ruling might bring suit then to restrain it. If the taxpayer could establish that the assessment had no firmer basis than disagreement with the court's conclusions, it might succeed in establishing what the Commissioner has termed a "blatant abuse of executive power," which would justify injunctive relief against the assessment even on the Commissioner's view in this case.

Presumably, exhaustion of administrative remedies would be required before even this type of relief could be given. And, contrary to suggestions by the Commissioner (Brief for Petitioner, pp. 10, 25-26), preliminary relief would doubtless be no more readily available than it is in any other kind of case. See, e.g., *Virginia Petroleum Jobbers Ass'n v. F.P.C.*, 259 F.2d 921 (C.A. D.C. 1958).

toration of the organization's name to the *Cumulative List*, the relief might bar an effort to assess tax even if the governing law or pertinent facts had significantly changed.<sup>24</sup> That consequence, however, flows, not from the order here sought from the court, but from the "advance assurance of deductibility" which the Revenue Service has itself chosen to grant in connection with its administration of the charitable provisions of the Code. See Revenue Procedure 72-39, 1972-1 C.B. 818. Respondent simply asks that, if it is found legally entitled to charitable qualification under section 501(c)(3), it enjoy the benefits which the Service affords to other groups which have established that status.

Moreover, it is purely conjectural whether appearance on the *Cumulative List* would, in fact, affect the revenue in the slightest. If respondent is not permitted to enter into this favored group, those prospective donors who rely on such listing may well contribute to other organizations appearing on the *List*. Confronted by the penalty taxes of section 4945, most private foundations will surely withhold their grants, or make them to others — leaving the revenue, again, unaffected. In this respect also, the situation now before the Court differs essentially from the mainstream of litigation under section 7421(a), where injunctive actions carry plain, direct, and immediate consequence for the revenue.

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<sup>24</sup> To the extent that relief is limited to restoration of the ruling only, no such bar would apply. See Rev. Proc. 72-39, 1972-1 C.B. 698.

**B. The Policy Behind Section 7421(a) Does Not Require Its Application Here**

This Court has viewed section 7421(a) as an integral part of "a system of corrective justice, intended to be complete" which includes "stringent measures, not judicial, to collect [taxes] . . . , with appeals to specified tribunals and suits to recover back moneys illegally exacted . . ." *Snyder v. Marks*, 109 U.S. 189, 193-94 (1883). It has noted that "there is no place in this system for an application to a court of justice until after the money is paid." *State Railroad Tax Cases*, 92 U.S. 575, 613 (1876). But the refund system, though well suited to typical tax controversies in which financial issues and past events predominate, is by its very structure an inadequate vehicle for providing relief from a wrongful decision on charitable qualification. As *amici* have argued, the mechanism is not aimed in theory at the resolution of the issues raised by such a wrongful decision nor is it adaptable in practice to remedy its consequences for the aggrieved organization.

There is no reason to believe that section 7421(a) was intended to preclude adequate relief in the circumstances presented here. At the time of its initial enactment, in 1867, Congress surely did not foresee that by the latter half of the twentieth century important interests would turn on a letter ruling program whereby the Revenue Service tentatively recognized, prior to assessment, an organization's eligibility to receive deductible contributions. Nor is there any indication in the subsequent re-enactments of section 7421(a), or in the various ways in which congressional notice has been taken of the letter ruling program, that Congress has ever considered the ade-

quacy of the refund remedy for a charitable organization injured by erroneous revocation of its letter ruling. The fact is that rulings on charitable status are not an integral part of the "system of corrective justice" of which this Court has spoken, and it cannot be assumed that Congress intended to remit parties suffering wrongful revocation of such rulings to a refund remedy that is so crudely fitted to their needs.

#### **C. Williams Packing Does Not Apply Here**

Finally, the Court's decision in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), upon which the Commissioner places near-exclusive reliance for his reading of section 7421(a), is by no means controlling here. *Williams Packing* was a prototypical example of the sort of premature judicial intervention in the normal tax collection process which section 7421(a) was designed to prevent. After the Government had made a formal demand for \$41,568.57 in social security and unemployment taxes, the taxpayer there brought suit seeking an injunction against the collection of this sum. *Williams Packing & Navigation Co. v. Enoch*s, 176 F. Supp. 168, 173 (S.D. Miss., 1959). It alleged that the assessment was illegal under the governing statutes, that collection of the taxes would destroy its business, and that the normal remedy of a refund suit was therefore inadequate. The Government disputed these allegations and claimed that the refund remedy was available and adequate. The lower courts found for the taxpayer.

This Court held that inadequacy of legal remedy alone was not a sufficient basis for the issuance of an injunction restraining the collection of taxes. Section 7421(a) reflects a strong congressional policy of pre-

venting courts from interfering with tax collection in cases where Congress has provided a generally adequate remedy in the form of a refund suit. "Thus, in general, the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid." 370 U.S. at 8. Whether the refund remedy is in fact adequate in a particular case presents, as *Williams Packing* itself demonstrated, a difficult factual question. If that were the sole question to be resolved before an injunction against collection could issue, the congressional purpose behind the "complete system of corrective justice" would not be respected.

The *Williams Packing* approach is perfectly suited to the *Williams Packing* facts—involving a taxpayer's effort, after the administrative collection process had already been set in train, to restrain the collection of taxes, and where lower courts had upheld the taxpayer's position on the dubious view that the refund remedy was inadequate in his particular case. The *Williams Packing* analysis does not, however, fit the present case. This controversy does not involve assessment or collection of taxes, so the clear words of the statute, so important a factor in *Williams Packing*, do not require its application here. Moreover, the inadequacy of the refund remedy for this type of action is a structural and general inadequacy, not merely one based on the difficulties encountered by a particular taxpayer in the payment of tax necessary to initiate a refund suit. Thus, the question here is whether the bar on injunctions is to be extended from the *Williams Packing* facts, where it is clearly required by the statutory words and policy and where it affords a workable accommodation of Government and taxpayer interests,

to the present situation, where none of those considerations apply and where its employment would contravene clear congressional policies and endanger rights protected by the First Amendment.

**D. A Bar on Adequate Judicial Review of Revocations of Exemption Rulings Would Undermine the Provisions of the Internal Revenue Code Relating to Charities**

*Williams Packing* states a sometimes harsh rule—that even a showing of the inadequacy of other remedies may not open the door to a judicial determination of the legality of executive action. That rule is probably necessary in the context of the normal tax audit, assessment, and collection process, and in any event has been clearly established by Congress to protect the Government's interest in orderly tax administration. Its invocation is, however, questionable in circumstances outside that context and where to apply it would contravene other strong policy considerations.

As discussed above, the Service's ruling program is tantamount to a licensing procedure for charities, under which the opportunity to function as an exempt organization pursuant to sections 501(c)(3) and 170(c)(2) is effectively determined by whether an organization has a ruling. Because of the inadequacies of alternative remedies, a holding that injunctive relief is unavailable would mean that the Service's ruling decisions relating to qualification as a charity would often escape review altogether.

This result—giving the Service virtually plenary power over the existence of charities—is squarely contrary to the intentions of Congress as expressed in sections 501(c)(3) and 170(c)(2). In providing special tax benefits to specified philanthropic organizations

and those who contribute to them, Congress was not endeavoring to raise revenues but to advance certain goals which it considered particularly worthy.<sup>25</sup> Congress concluded that the service of public purposes through private charitable action deserves support through the tax laws.<sup>26</sup>

The legislative policy was thus to encourage a pluralistic nongovernmental performance of public functions.

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<sup>25</sup> Commissioner of Internal Revenue Donald C. Alexander recently expressed the same thought in published remarks at a meeting of the American Society of Association Executives in New Orleans, Louisiana, August 29, 1973:

The IRS recognizes that the exempt organization provisions of the law must be interpreted and administered in light of their special purpose and their place in the tax law. Their purpose is *not* to raise revenue. Rather, they are designed to act as a guardian. They insure that exempt organization assets will be put to the approved uses contemplated in the law. Their application calls for an extraordinary degree of care and judgment.

BNA Daily Tax Report, August 30, 1973, p. J-1. [Emphasis in original.]

<sup>26</sup> These considerations are amply reflected in, for example, the 1965 Treasury Department Report on Private Foundations:

Private philanthropic organizations can possess important characteristics which modern government necessarily lacks. They may be many-centered, free of administrative superstructure, subject to the readily exercised control of individuals with widely diversified views and interests. Such characteristics give these organizations great opportunity to initiate thought and action, to experiment with new and untried ventures, to dissent from prevailing attitudes, and to act quickly and flexibly. Precisely because they can be initiated and controlled by a single person or a small group, they may evoke great intensity of interest and dedication of energy. These values, in themselves, justify the tax exemptions and deductions which the law provides for philanthropic activity.

Report submitted to the Committee on Finance, United States Senate, 89th Cong., 1st Sess. 12 (Comm. Print).

Congress certainly did not intend to undermine its own policy by giving an executive agency, the Internal Revenue Service, unreviewable and therefore "unabusable" discretionary power to decide what charitable organizations may and may not do. The position of Congress was in fact clearly stated recently, in the Committee reports dealing with the Tax Reform Act of 1969. Explaining the newly added section 508(a), which requires organizations claiming section 501(e) (3) exemption to notify the Service that they are applying for recognition of such status, both Houses stated that "as under present law, the nature of the organization itself—not the determination of the Service—will control in determining whether the organization is exempt."<sup>27</sup> But without direct judicial review of the Service's rulings, as distinguished from the possibility of indirect judicial review in refund actions, the Service will in many cases be the final arbiter of which organizations are exempt charities and which are not.<sup>28</sup>

Such unfettered Service control over the scope of private charitable action would be more than merely anomalous. It would ill serve the congressional design. The issues raised by sections 501(e)(3) and 170(e)(2)—for example, what is a "charitable" or "educational" purpose—do not fall within the domain of the Revenue Service's particular expertise in the administration of the revenue laws. These issues involve concepts rooted in the common law, and are peculiarly

<sup>27</sup> H. Rep. No. 91-413 (Part I), 91st Cong., 1st Sess. 38 (1969); S. Rep. No. 91-552, 91st Cong., 1st Sess. 54 (1969).

<sup>28</sup> As Commissioner Thrower stated, the situation "in practical effect . . . gives a greater finality to IRS decisions than we would want or Congress intended." Thrower Remarks, p. 4.

well-suited for court determination. Compare, *e.g.*, *Barlow v. Collins*, 397 U.S. 159, 166 (1970), relying upon *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 14 (1968) (Harlan, J., dissenting). Indeed, the Service's regulations recognize this very point, defining the statutory word "charitable" in terms of its "generally accepted legal sense" and "the broad outlines of 'charity' as developed by judicial decisions."<sup>29</sup> If injunctive relief does not lie in cases such as the present one, judicial decisions in this area will be rare.

As Commissioner Thrower observed, the situation "inhibits the growth of a body of case law interpretative of the exempt organization provisions that could guide the Internal Revenue Service in its further deliberations."<sup>30</sup> The problem is only enhanced by the fact that "we live in times of innovative thought. What people conceive of today as beneficial to the community in the charitable sense may involve concepts and approaches not remotely approached by the courts in past years."<sup>31</sup> Without judicial review of the Service's ruling determinations under sections 501(c)(3) and 170(c)(2), the Internal Revenue Service would be "the arbiter of innovation in the charitable field."<sup>32</sup> This would thwart the underlying purposes of those special tax provisions.

Absolute and unreviewable administrative discretion is the rare exception in our system of law. This Court

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<sup>29</sup> Treas. Reg. § 1.501(c)(3)-1(d)(2). "Charitable" is recognized by the Service as the broadest of the statutory terms, embracing more specific terms such as "educational," "religious," and "scientific." Thrower Remarks, pp. 2, 6.

<sup>30</sup> Thrower Remarks, p. 4.

<sup>31</sup> Thrower Remarks, pp. 2-3.

<sup>32</sup> Thrower Remarks, p. 4.

has not generally favored the preclusion of judicial review of administrative actions having important consequences, and in fact its decisions point sharply in the opposite direction. There is a "presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose." *Tooahnipah (Goombi) v. Hickel*, 397 U.S. 598, 606 (1970); *City of Chicago v. United States*, 396 U.S. 162, 164 (1969); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). No such "persuasive reason" can be found in the words or policy of section 7421(a). And in the policies and purposes of the charitable organization provisions, there is ample justification for applying the presumption in favor of judicial review.<sup>23</sup>

The Commissioner contends that such review would place an inordinate burden on the Government. To the extent that the alternative remedies which he proposes are, as he contends, adequate to protect respondent's interests, the Government would have exactly the same burden, though at a different point in time, that the relief requested here would entail. The Commissioner is correct in asserting added burden only on the premise — correct in fact — that the alternatives he suggests would frequently result in no judicial review at all. The answer, then, to the Commissioner's argument based on burden is that the need to conserve Government manpower cannot be allowed to preclude ade-

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<sup>23</sup> Compare *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970): "The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized."

quate judicial review for persons aggrieved by adverse agency action.<sup>34</sup>

In sum, *amici* urge rejection of the Commissioner's argument against review on the basis of section 7421(a).<sup>35</sup> *Amici* ask the Court to hold that, upon a showing of an unlawful revocation of respondent's ruling, the injunctive remedy is available in this case.

**IV. SECTION 7421(a) SHOULD BE HELD NOT TO APPLY IN THIS CASE BECAUSE ITS APPLICATION HERE WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS**

*Amici* have thus far argued for affirmance of the Court of Appeals' decision wholly without reference to the important First Amendment interests which are at stake in this case. However, these interests present a number of further reasons why the Court below was correct in upholding meaningful judicial review of the

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<sup>34</sup> Moreover, in the seven years prior to May 1972, the Service had revoked only seven section 501(e)(3) exemptions for prohibited legislative activity. Letter from Edwin S. Cohen, Assistant Secretary of the Treasury for Tax Policy, to Chairman Wilbur D. Mills, May 25, 1972, in *Hearings on H.R. 13720 Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. at 15 (1972). This suggests that availability of prompt judicial review in disputes of the precise type involved here would not impose an inordinate burden on the Government's litigation resources or on the courts.

<sup>35</sup> The Commissioner's other arguments are clearly without merit. His own quotations from the legislative history of the Declaratory Judgment Act (Brief for Petitioner, pp. 37-42) establish that that statute's restriction on relief in tax cases must be considered coterminous with the restriction in section 7421(a). His position on sovereign immunity (Brief for Petitioner, pp. 42-49) would effectively preclude most suits to prevent the enforcement of unconstitutional statutes. And, contrary to his contentions (Brief for Petitioner, pp. 49-56), the First and Fifth Amendment issues raised by sections 501(e)(3) and 170(e)(2) clearly warrant the convening of a three-judge court.

revocation of respondent's ruling. Prior decisions of this Court raise serious constitutional doubts about an interpretation of section 7421(a) that would effectively accord the Revenue Service an unreviewable life-or-death power to restrain charities' activities. And it would seem appropriate, under settled canons of statutory construction, to interpret the statute in a fashion that will avoid such doubts. See, e.g., *United States v. Rumely*, 345 U.S. 41, 45-46 (1953); *Kent v. Dulles*, 357 U.S. 116, 128-29 (1958); *Gutknecht v. United States*, 396 U.S. 295, 306 (1970). Therefore, even if section 7421(a) is thought generally to preclude injunctive relief when a ruling on charitable status is revoked, such relief should nonetheless be held available in this case, where a substantial claim is made of unconstitutional restrictions on First Amendment activities.

The Commissioner belittles the emphasis which the Court of Appeals placed on the constitutional nature of respondent's claims. He notes that section 7421(a) has been held to apply irrespective of allegations of unconstitutionality. And he asserts that the approach taken by the court below invites circumvention of the policies behind the section, since many ordinary tax suits could be framed in constitutional terms. (Brief for Petitioner, pp. 22-23.) But none of the constitutional cases cited by the Commissioner involved the threat to freedom of expression that is involved here. And it is not an easy matter to convert the ordinary tax suit into a nonfrivolous claim of restraint on First Amendment freedoms.

The tax laws relating to charities are unique in their impact on First Amendment activity. In practice, ex-

ercise of the right of association to advance common interests frequently depends on qualification of the association for section 501(c)(3) exemption. Moreover, speech and speech-related activities are a primary means—and often the only means—whereby the “religious,” “charitable,” and “educational” purposes specified in the statute can be advanced.<sup>36</sup> The Revenue Service, whose task it is in the first instance to interpret and apply the statutory classifications, is continually charged with the delicate task of determining whether particular forms of First Amendment activities qualify for the statutory benefits. To the extent that the Service errs in such judgments—and the interpretation of terms such “charitable” and “educational” require exceedingly fine legal and factual judgments—the error may be constitutionally, as well as statutorily, impermissible.<sup>37</sup>

Furthermore, the very terms of the statutory provisions touch upon First Amendment rights. Sections

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<sup>36</sup> The pertinent Treasury Regulations reflect these facts by acknowledging that organizations exempt as “charitable” or “educational” may engage in advocacy of positions on controversial issues. See, e.g., Treas. Reg. §§ 1.501(e)(3)-1(d)(2), -1(d)(3).

<sup>37</sup> Of course, not all of these judgments necessarily give rise to First Amendment questions. Some criteria under the statute—for example, absence of inurement of benefits to private individuals—may require disqualification for reasons having nothing to do with an organization’s First Amendment activities. But the concern expressed in text is very real. *Amici* are aware, for example, of the denial of a ruling to one organization seeking recognition as “educational” because, in the Service’s view, the organization did not employ “an educational methodology communicating a useful body of organized knowledge.” Whether or not the statute authorizes a judgment of this nature, the agency is plainly operating in an area of subtle constitutional judgments.

501(c)(3) and 170(c)(2) explicitly condition the benefits they provide on the foregoing of substantial activities involving "attempting . . . to influence legislation." Restrictions on such activities clearly must meet First Amendment standards. In the present case the Service has relied upon the statutory restrictions in determining that respondent engages in excessive expression and therefore does not qualify for the statutory benefits. Respondent seeks—and the Court of Appeals granted—an opportunity for a judicial determination of its claim that those statutory restrictions are unconstitutional, both on their face and as applied by the Revenue Service.

The fact that sections 501(c)(3) and 170(c)(2) do not purport to regulate First Amendment activities directly, but merely to grant or withhold important tax benefits on the basis of such activities, does not detract from the force of respondent's constitutional contentions. It is settled that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958).<sup>38</sup>

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<sup>38</sup> This Court's decision in *Cammarano v. United States*, 358 U.S. 498 (1959), by no means disposes of the First Amendment issues presented here. *Cammarano* upheld a regulation denying taxable corporations a business expense deduction under section 162 for the costs of efforts to influence legislation. Section 162(e), enacted by Congress in 1962, specifically makes most costs of business lobbying activities deductible, thereby eliminating the "sharply defined policy" against tax-free legislative activities on which this Court relied in *Cammarano*. This change also introduces an imbalance between businesses and charities with respect to the effect of legisla-

The need for access to the courts to protect First Amendment rights is the greater here because a prior restraint is at issue. Even without the Service's letter ruling program, sections 501(c)(3) and 170(c)(2) would arguably give rise to First Amendment controversies requiring judicial review. But the ruling program, whereby the Service effectively licenses organizations to raise funds and pursue the statutorily favored purposes, makes the validity of unreviewable Service discretion even more dubious. Operating through this program the agency is not functioning as an adjudicator of past facts, but rather is screening for the future: as a censor. As *amici* have discussed, the denial or revocation of a ruling generally means, as a practical matter, that an organization's activities —many of which will be First Amendment activities — will at least be sharply curtailed and often that the organization will go out of existence. Thus the ruling program permits the Service effectively to choose either to permit or to prevent the exercise of First Amendment rights by the very large class of organizations which must rely on contributions from the public.

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tive activities on tax benefits. See Statement of Edwin S. Cohen, Assistant Secretary of the Treasury for Tax Policy, in *Hearings on H.R. 13720 Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. at 607 (1972). Such an imbalance raises important equal protection claims not present when *Cammarano* was decided. See, e.g., *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

Moreover, the restrictions of sections 501(c)(3) and 170(c)(2), which in practice condition an exempt charitable organization's entire existence on refraining from substantial legislative activity, present a very different issue from the limited question of whether a business may or may not deduct certain of its expenses. See 358 U.S. at 515 (Douglas, J., concurring).

The Service's administrative program of screening organizations for compliance with the broad statutory provisions, and of issuing letter rulings reflecting its conclusions, carries all the hallmarks of a system of prior restraints. Ruling denials or revocations can exert a far greater practical burden and a far more severe restraint on First Amendment activities than this Court found in the activities of a university administration in *Healy v. James*, 408 U.S. 169, 181, 184 (1972). And the Commissioner's claim of an essentially unreviewable power to prevent First Amendment activities through the issuance of ruling denials or revocations appears untenable in light of other decisions of this Court.

It has been held that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The Court has repeatedly indicated that, to be sustained at all, such a system must include carefully drawn procedural safeguards against abuse. See, e.g., *United States v. Thirty-seven (37) Photographs*, 402 U.S. 363 (1971); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrants of Property*, 367 U.S. 717 (1961). The general principle often echoed in the decisions is that "the freedoms of expression must be ringed with adequate bulwarks." *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 66, citing *Marcus v. Search Warrants of Property*, *supra*; *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Winters v. New York*, 333 U.S. 507 (1948);

*NAACP v. Button*, 371 U.S. 415 (1963); and *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

In particular, a system of prior restraints must include provision for expeditious judicial review. *Blount v. Rizzi, supra*; *Freedman v. Maryland, supra*; *Teitel Film Corp. v. Cusak*, 390 U.S. 139 (1968); *Bantam Books, Inc. v. Sullivan, supra*; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155 n.4 (1969). The administration of the system cannot be "in a manner which would lend an effect of finality to the censor's determination . . ." *Freedman v. Maryland*, 380 U.S. at 58. Because "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Ibid.*

While the Court has most fully developed the implications of these principles in the area of obscenity, they apply with at least equal force in other areas where First Amendment interests are importantly in question.<sup>39</sup> In this case, for example, the loss of respondent's ruling has drastically limited all of its prior activities, including legislative activities. There is an even greater need for judicial supervision of restraints of this nature than in the case of expression that is arguably obscene. Compare *Shuttlesworth v. Birmingham*, 394 U.S. at 162-63 (Harlan, J., concurring).

The Commissioner maintains that the restraints imposed on charitable organizations through his letter ruling program cannot be reviewed directly, by actions

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<sup>39</sup> See generally Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 520-26 (1970).

seeking injunctive relief. But the alternative remedies which he proposes involve considerable delay and are inadequate for other reasons as well. These alternative remedies are "too little and too late" to provide effective review of prior restraints on expression imposed by the Revenue Service. *Freedman v. Maryland*, 380 U.S. at 57; see *Teitel Film Corp. v. Cusak*, 390 U.S. at 141-42; *Blount v. Rizzi*, 400 U.S. at 418-19. If the Commissioner's position were to be sustained in this case, the import of *Freedman* would be sharply circumscribed. For the Commissioner is essentially claiming that a policy favoring rapid collection of taxes should override the First Amendment, "an interest of transcending value." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

It is not necessary in this case for the Court to decide the constitutionality of a statute which effectively bars adequate review of prior restraints on expression. Section 7421(a) need not be so interpreted. The statute can be construed not to apply in cases raising substantial First Amendment claims. If the Court rejects the position stated in the prior portion of this brief—that injunctive relief is always available for denial of a ruling on charitable qualification—*Amici* urge the Court to affirm the decision of the Court of Appeals on this constitutional basis.

**CONCLUSION**

For the foregoing reasons, *amici* believe that the decision of the court below is correct and should be affirmed by this Court.

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